No. 08-1102

In The
Supreme Court of the United States

DANIEL and ANDREA McCLUNG,
Petitioners,

v.

CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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RESPONSE TO THE CITY'S RESTATEMENT OF THE QUESTIONS PRESENTED

The City reformulates the questions presented in terms that dramatize how narrowly the Ninth Circuit interprets *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and why the Court should accept review to clarify and reaffirm its *Nollan / Dolan* jurisprudence.

The City contends that – outside the allegedly special context of required land dedications – *Nollan / Dolan* scrutiny applies *only* to land use exactions that are individually reviewed and tailored through adjudication. *See* City's Opposition, Question Presented. Exactions that are not processed through individualized adjudication are exempt from heightened scrutiny and reviewed only under the deferential multi-factor standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which is to say, they are subject to virtually no scrutiny at all. While the City fairly represents the Ninth Circuit's rule, its restatement reveals clearly just how far the Ninth Circuit has strayed from *Dolan*.

Under the Ninth Circuit's rule, all facial challenges to generally applicable permit regulations are reviewed only under the deferential *Penn Central* analysis because a facial challenge challenges the legislative act itself. The same is true for any other permit requirements that are not subject to modification or tailoring by adjudication. Thus, government can avoid the rigors of *Dolan's* rough proportionality test simply by making the permit exaction mandatory and denying adjudicative review.

To illustrate the operation of such a bizarre rule, suppose that a city required residential permit applicants to replace any play structures at the nearest city park that fall below current standards for quality, condition or performance. Suppose that when the Browns apply for a permit to build a new house, the city requires them to make $50,000 in upgrades to the swings and climbing structures at the nearest park because the equipment no longer meets standards. Assume, too, that this upgrade is wholly disproportionate to the slight increase in park use caused by the Browns' new house. Under the Ninth Circuit's rule, if the City provides the Browns with adjudicative review, *Dolan's* rough proportionality test will kick in, and the disproportional upgrade requirement will be struck down (or what is the same thing, the Browns will receive compensation). However, if no review is authorized, the $50,000 exaction stands because it easily survives the deferential *Penn Central* analysis.[1]

But this result is absurd. How can the validity of an upgrade exaction turn on the availability of adjudicative review? What sense does it make to reward governments with absolution from *Dolan's* rough proportionality requirement if they deny review to permit applicants, but punish governments with the rigor of heightened judicial scrutiny if they do offer relief? How can an upgrade obligation be a compensable taking if the city provides review, but not a taking if the city denies review?

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[1] The same analysis would equally apply, of course, to required upgrades for other public infrastructure, *e.g.*, schools, roads, public safety facilities, utilities, etc.

The nexus and rough proportionality standards of *Nollan / Dolan* provide a principled basis for distinguishing legitimate land use regulations which require developers to internalize the externality costs of their new development, from the illegitimate use of the permit power to extort public benefits. Under *Dolan,* government cannot demand a disproportionate exaction as the price of permit approval. The Ninth Circuit's rule overrides this policy and converts *Dolan's* substantive requirements into an absurd and counter-productive procedural gambit. It allows disproportionate exactions, provided only, that government refuse to offer an adjudicative remedy. This bizarre result conflicts with *Dolan,* with the holdings of other lower courts, and with logic and fairness.

ARGUMENT IN REPLY

A. Other Lower Courts Do Not Generally Agree with the Ninth Circuit's Rule.

The City argues that the lower courts generally agree with the Ninth Circuit's odd reading of *Dolan*. Opp. 7. If that were true, it would make the need for review even more compelling. However, courts and commentators of all stripes agree that Takings jurisprudence continues to be plagued with conflict, confusion and uncertainty.

The Texas Supreme Court's unanimous and well-reasoned decision in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 641 (2004), stands in stark contrast and direct conflict with the Ninth Circuit's rule. The City attempts to explain away this conflict by asserting that the Texas court

based its decision on the "adjudicative" nature the street upgrade obligation there at issue. Opp. 9. But the opposite is true. The Texas court expressly *rejected* the Ninth Circuit's view that the applicability of *Dolan* depends on whether the exaction is deemed to be "legislative" or "adjudicative."[2] *Flower Mound*, 135 S.W.3d at 641. Instead, the court looked to substance, holding that there was no meaningful distinction between requiring a developer to dedicate land for public pathways and requiring him to upgrade a public street. *Id.*

The City's claim that *Flower Mound* supports its notion that lower courts widely agree with the Ninth Circuit's interpretation of *Dolan* is disingenuous. Even the Ninth Circuit recognized the conflict between its decision and *Flower Mound*. App. 11a.

The City asserts that *Simpson v. City of North Platte*, 292 N.W.2d 297 (Neb. 1980), does not conflict with the Ninth Circuit's rule because *Simpson* predates *Dolan*. Opp. 12. But timing is irrelevant. *Dolan* specifically adopted *Simpson's* "reasonable relationship" standard for evaluating exactions under the federal Takings Clause. *Dolan*, 512 U.S. at 390.

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[2] The difficulties with the legislative/adjudicative formulation are overwhelming. There in not even agreement on what is legislative and what is adjudicative. For example, the Ninth Circuit, itself, has opined in a different context that, "[p]rocessing an individual application pursuant to an established policy is not a legislative function," *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163 (2005), yet here it reached the opposite conclusion. The Texas court rightfully concluded that the legislative/adjudicative labels are not helpful.

Nothing suggests that the Nebraska court has changed its view since *Dolan* was decided.

Simpson directly contradicts the idea that heightened scrutiny only applies to adjudicative decisions. It was a facial challenge to a generally applicable ordinance, yet heightened scrutiny was applied.[3] The same was true in *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995), a facial constitutional challenge to a legislatively enacted impact fee ordinance. While *Home Builders* was resolved on state constitutional grounds, that was only because the court applied Illinois' more stringent "specific and uniquely attributable" test, rather than *Dolan's* rough proportionality test. The opinion is clear that *Dolan*, not the lax *Penn Central* analysis, would have applied had Illinois' state law test not been more stringent than *Dolan*.

B. The Court Should Make Clear that *Dolan* Applies to Monetary Exactions as Well as Other Forms of Property.

The City argues that this case does not present the issue of whether *Nollan/Dolan* scrutiny applies to monetary exactions because the Ninth Circuit did not address that issue. Opp. 15-20. But this mischaracterizes the Ninth Circuit's decision. Although the Ninth Circuit's primary holding was that

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[3] Simpson did involve a land dedication rather than a monetary exaction, but neither the City nor the Ninth Circuit offers any sensible justification for differentiating between land exactions and monetary exactions.

the stormwater upgrade obligation was a general land use regulation rather than an exaction, the court went on to hold, in the alternative, that, "Even if the upgrade could be viewed as a monetary exaction . . . *Nollan / Dolan* still would not apply. A monetary exaction differs from a land exaction – [u]nlike real or personal property, money is fungible." App. A, 17a (internal quotations and citations omitted). The Ninth Circuit erred in holding that a stormwater upgrade obligation is not an exaction. It was equally wrong in concluding that, because money is fungible, monetary exactions are exempt *per se* from *Nollan / Dolan* scrutiny.

Obviously, not all monetary demands by government require compensation. It is equally true, however, that not all monetary demands are exempt from the compensation requirement. Whether compensation is due depends on the nature of the exaction, not the form of property taken. When government exacts payment for public facilities, it must satisfy the essential constitutional demands for a valid tax, including that it be laid by a non-arbitrary rule of apportionment that treats taxpayers within defined classes uniformly. *Houck v. Little River Drainage Dist.*, 239 U.S. 254 (1915). An exaction, such as that sanctioned by the Ninth Circuit rule, which falls more arbitrarily than the Roman Legions' rule of decimation does not satisfy this standard, regardless of how generally it is applied.[4] A regulation that

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[4] At least decimation followed a regular pattern of selection and carried a uniform consequence. Under the Ninth Circuit's rule, the pattern of selection and the size of the exaction can be entirely serendipitous. It is a rule of generally applicable caprice under which the applicant's burden is determined by the happenstance

requires the permit applicant to make a unique, disproportionate upgrade to public infrastructure is not valid as a tax and not valid as a land use regulation. It is a taking of the applicant's property for public use which requires just compensation. *See Vill. of Norwood v. Baker*, 172 U.S. 269, 278-279 (1898);. *Wight v. Davidson*, 181 U.S. 371, 384-385 (1901).

C. This Case Is an Excellent Vehicle to Address the Application of *Nollan/Dolan* Scrutiny to Public Infrastructure Upgrade Requirements.

The City's final argument against granting the Writ is that "lurking ripeness concerns" and potential difficulties in resolving the Ninth Circuit's misapplication of the unconstitutional conditions doctrine make this "an exceedingly poor vehicle for reaching the questions presented." Opp. 21-24. Nothing could be further from the truth.

1. Ripeness is not an issue.

First, the City's threat of "lurking ripeness concerns" rings hollow. The Ninth Circuit correctly determined that any ripeness concerns are only prudential, not jurisdictional. App. A, 8a-9a. Objections based on prudential ripeness can be waived; and here, the City waived its objections, not just once but twice. It first waived when it removed the case to federal court. That removal would have been improper had further state court proceedings been necessary to

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of what new or improved public facilities are desired when the permit application is submitted.

ripen the federal issues. By seeking removal, the City implicitly represented that the McClungs' federal claim was ripe for consideration, thereby waiving any claim that it was not ripe. *Cf. Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002) (state waives Eleventh Amendment immunity by removing case to federal court).[5]

The City waived its ripeness objections a second time at oral argument before the Ninth Circuit. There, to gain the advantage of a favorable determination on the merits, the City expressly stipulated that the McClungs' federal claim was ripe. App. A, 8a, n. 2. The City cannot now reverse course and assert that the McClungs' federal claim is not ripe. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel bars a party from adopting a position that contradicts a position that it had earlier successfully asserted).

2. The Ninth Circuit's voluntary contract rule would substantially undermine the doctrine of unconstitutional conditions.

The City argues that the Ninth Circuit's voluntary contract holding is well grounded in state law and provides yet another reason to deny certiorari. Opp.

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[5] *See also Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (2003); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 340 n. 22 (2005). If, as *San Remo* indicates, a party waives his right to return to district court if he voluntarily presents his federal claims for decision in state court, so too, a party who chooses to remove a case to federal court based on federal question jurisdiction cannot thereafter claim that the federal question is not ripe for adjudication in federal court.

24. To the contrary, the Ninth Circuit's voluntary contract theory irreconcilably conflicts with the doctrine of unconstitutional conditions. Correcting the Ninth Circuit's clear error is not an impediment to review – it is a further reason why review should be granted.

The unconstitutional conditions doctrine restricts government from exacting a waiver of constitutional right as a condition to the grant of a discretionary benefit. In the land use context, it bars government from exacting property as a condition of permit approval where the exaction would otherwise require just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530 (2005). The Ninth Circuit's voluntary contract theory would allow governments to circumvent the unconstitutional conditions doctrine simply by granting a minor permit concession when it imposes the unconstitutional condition. The scheme works like this: Government imposes an unconstitutional permit condition, but in doing so, also includes a minor permit concession. The concession and the unconstitutional condition are then severed (conceptually) from the permit application and become the *quid pro quo* for a separate implied contract in which the concession is exchanged for acceptance of the unconstitutional condition. The unconstitutional permit condition thereby sheds its taint of unconstitutionality because it is transformed into the consideration for a voluntary contract. The best part of this, from the government's view, is that the permit applicant need not expressly agree to the deal or even have the slightest understanding of what is happening. Merely by accepting perforce the permit with the concession and unconstitutional condition included,

the implied bargain is sealed and the unconstitutionality of the condition vanishes.

If allowed to stand, this implied contract theory will undermine the doctrine of unconstitutional conditions. Government need only throw in a little sweetener along with the unconstitutional condition to nullify application of the doctrine. The Court need not shy away from granting review in fear that it will have to correct this debasement of the doctrine of unconstitutional conditions.

D. The City's Restatement of Facts Should Be Disregarded.

The City's "Statement" recasts the substantive and procedural history of this case to suggest that the McClungs improperly slept on their rights; that their paving of the vacated alley significantly increased impervious surface area which exacerbated runoff problems; and that their federal takings claim is no more than an insignificant and belated afterthought, unworthy of this Court's attention. These characterizations are not correct. Moreover, those facts that are faithfully related by the City are irrelevant to the questions presented.

The McClungs did not sleep on their rights. They voiced no objection at the time the permit was issued because they correctly understood that their sole choice was to either comply with the City's demand for a 24-inch pipe or abandon their project. They timely filed their legal action. They did not, as the City claims, delay four years to first raise their federal claim. The Washington Court of Appeals held that the original 1998 complaint and 1999 summary judgment

motion provided the City fair notice of the federal claims under Washington's notice pleading rules, noting that the City's contrary argument "mischaracterized" the complaint and summary judgment. *Tapps Brewing Co. v. City of Sumner*, No. 31959-4 II, 2005 WL 151932 (Wash. Ct. App. Jan. 25, 2005). Nevertheless, when the City removed to federal court it renewed its mischaracterizations (unfortunately to better effect).

The City's claim that "paving the alleyway would ... exacerbat[e] the stormwater runoff" (Opp. 2) is baseless. The alley was already impervious. Sumner Municipal Code ("SMC") § 12.48.200. The large stormwater main the McClungs had to install was grossly disproportional to the minor impact of their development.

Finally, the City suggests that review be denied because the McClungs failed to pursue their administrative remedies: a variance or latecomer agreement. Opp. 10-11, 23. But 42 U.S.C. § 1983 does not require exhaustion of administrative remedies.[6] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985). Moreover, the alleged remedies offered by the City are illusory. As in *Simpson, supra,* Sumner offered variances only in "exceptional circumstances" causing "unnecessary hardship." SMC § 13.48.480. The McClungs' claim of disproportionality did not qualify for such a variance. Nor was a latecomer agreement a viable option. In a

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[6] Under § 1983 the issue is ripeness, not exhaustion of remedies. The City has expressly stipulated that McClungs' federal claim is ripe.

latecomer agreement, the property owner agrees to install a public water or sewer line in a developing area and is repaid by other owners when they, too, develop their property and connect to the line. *See* Wash. Rev. Code § 35.91.020. The City Engineer acknowledged at trial, however, that such an agreement would have been useless for the McClungs because the area served by the storm main at issue was already developed and the other properties were already connected. App. 1, 1a.

The City has shaded the facts to prejudice the reader and mask its inequitable treatment of the McClungs. Putting this innuendo aside, however, the City did not identify *any* misstatements of fact in the Petition for Writ of Certiorari. *See* Supreme Court Rule 15(2). Because the facts stated in the Petition are correct and because the City's counter statement is unnecessary and prejudicial, it should be disregarded.

CONCLUSION

Opinions vary widely on the proper role of government in land use regulation. But even if government is afforded broad powers to regulate land use, that needn't include the power to abuse. The Ninth Circuit rule only clouds the already murky waters of Takings jurisprudence. If the purpose of the Takings Clause is to prevent government from imposing on some the public burdens which, in all fairness and justice, should be borne by the public as a whole, it must require compensation when an owner is arbitrarily selected to pay for general public infrastructure improvements that are not reasonably related to his development's public impacts. *Dolan's* modest effort to constrain unbridled government

discretion with considerations of fairness and efficiency is not an undue burden on government, it is a vital protection of constitutional rights.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

No. 98-2-06522-8

[Filed June 17, 2002]

TAPPS BREWING, INC., a Washington corporation, and DANIEL McCLUNG and ANDREA McCLUNG, individually and as a marital community,	)
Plaintiffs,	)
vs.	)
CITY OF SUMNER,	)
Defendant.	)

VERBATIM RECORD OF PROCEEDINGS
June 17, 2002 Tacoma, Washington

* * *

[p.35] [William Shoemaker] "It [the Sumner Municipal Code] speaks about oversizing, the requirement to install it if it's needed, and it gives several methods of financing. One is a latecomers, which didn't seem very appropriate or very likely that Mr. McClung would ever see any money back, [p.36] because it's a developed area . . . ."

* * *